No. 88-1668

In The

Supreme Court of the United States

October Term, 1989

ATLANTIC RICHFIELD COMPANY,

Petitioner,

v.

USA PETROLEUM COMPANY,

Respondent.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

REPLY BRIEF OF PETITIONER ATLANTIC RICHFIELD COMPANY

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Petitioner Atlantic Richfield Company ("ARCO") respectfully submits this Reply Brief.

Respondent USA Petroleum Company ("USA") and its *amici* assert that ARCO's antitrust-injury argument asks the Court to rewrite the substantive elements of vertical maximum price fixing. (Respondent's Brief ("Resp. Br.") 9-10, 30-35.) ARCO, however, seeks no change in the substantive law under section 1 of the Sherman Act. ARCO asks only that the private remedies available under sections 4 and 16 of the Clayton Act not be divorced from the reasons why vertical maximum price fixing is illegal.

USA, on the other hand, does seek a change in the existing law. It seeks an expansion of the class of private plaintiffs who can challenge the low prices resulting from vertical maximum price fixing beyond the coerced dealers who have brought such claims in the past. USA would allow competitors, who frequently are poor champions of the consumer interests that are the primary concern of the antitrust laws, to attack these low prices.

USA's claim is unprecedented, as is confirmed by the failure of USA or any of its *amici* to cite a single opinion (save the Ninth Circuit opinion here) allowing a competitor to recover its lost profits and sales resulting from vertical maximum price fixing. More importantly, USA's attempt to substitute vertical maximum price fixing for its failed predatory pricing case[1] runs foursquare into this Court's antitrust-injury requirement. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) ("*Cargill*"); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) ("*Brunswick*").

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[1] USA abandoned its predatory pricing case when it realized that the realities of the retail gasoline market (as opposed to the fictitious allegations of its complaint) made it impossible to prove dangerous probability of monopolization or predatory pricing "even by the most liberal standards." (*See* Petitioner's Brief ("Pet. Br.") 6 n.5.) USA now contends that the District Court's "finding that ARCO did not have a dangerous probability of monopolization is erroneous," because the finding was based upon the wrong geographic market. (Resp. Br. 6-7 n.7.)

(Continued on following page)

Prior to its Brief in this Court, USA consistently asserted that it could clear the antitrust-injury hurdle simply by incantation of the *per se* label.[2] The challenge of defending the Ninth Circuit decision in this Court has caused USA for the most part to abandon its formalistic contention that the *per se* label determines the antitrust-injury inquiry.[3] USA

(Continued from previous page)

USA's contention comes far too late. USA not only did not dispute this finding in the District Court, it conceded that "there is no dangerous probability of monopolization." (*See* Pet. Br. 6 n.5.) USA expressly did not challenge this finding on appeal (*id.* at 7-8 n.7), which independently precludes USA from challenging the finding here. (*See* authorities cited at Pet. Br. 44 n.28.) USA's contention also is wrong as a matter of economics and law, as ARCO proved on the motion that caused USA to dismiss its section 2 claim. (*See* Dckt. NR 79, 80.) Finally, USA's proposed geographic market definition is inconsistent with its Amended Complaint. (JA 22, ¶ 46.)

[2] In the District Court, USA (i) argued that the *per se* illegality of vertical maximum price fixing made unnecessary any inquiry into the market effects of ARCO's assumed vertical maximum price fixing, (ii) did not challenge ARCO's factual showing that the reduced ARCO prices posed no threat of creating the market power necessary to charge supra-competitive prices and (iii) did not attempt to demonstrate any injury to the retail gasoline market. It instead simply asserted injury to itself as a competitor. (*See* Dckt. NR 89.) USA's Statement Of Genuine Issues In Opposition To Defendant's Motion makes this crystal clear by contending that there were only two "genuine issues of fact" on ARCO's summary judgment motion: (1) whether ARCO engaged in vertical maximum price fixing and (2) whether that price fixing "has caused USA injury and in what amount." (JA 86-87.) The District Court accepted as true both facts but found that these facts were insufficient to establish antitrust injury.

[3] USA first backed away from this position in the Brief in Opposition to the Petition ("Br. in Opp."). Apparently conceding the possibility that the antitrust-injury requirement might demand proof that the ARCO prices were predatory, USA contended that it was free to prove predatory pricing on remand because the issue had been neither tendered nor decided below. USA now apparently has abandoned this contention, which ARCO conclusively has refuted. (*See* Reply Br. In Support Of Pet. 5-9; Pet. Br. 43-44 n.27; *compare* Question Presented in Br. in Opp., i, *with* Questions Presented in Resp. Br., i.)

leaves the States' Brief *Amici Curiae* ("States' Br.") to defend that position. USA instead contends that a competitor's loss from vertical maximum price fixing constitutes antitrust injury because such loss reflects anticompetitive effects that either form the basis of *per se* illegality or that could be the reason for finding such conduct unlawful under the rule of reason.

None of the contentions advanced by USA and its *amici* has merit. The States' Brief, which most closely endorses the Ninth Circuit's opinion, is wrong at the most basic level. It, like the Ninth Circuit, impermissibly would substitute artificial line drawing for the rigorous analysis required by the Court's antitrust-injury opinions. While USA more honestly acknowledges the elements of the antitrust-injury analysis, it distorts the analysis itself.

I. A COMPETITOR CANNOT PRESUME ANTITRUST INJURY FROM THE *PER SE* ILLEGALITY OF VERTICAL MAXIMUM PRICE FIXING

ARCO's Brief demonstrated the error of the Ninth Circuit's presumption that the antitrust-injury issue is controlled by this Court's prior rulings that vertical maximum price fixing is *per se* illegal. (Pet. Br. 18-21.) Each of the three assertions made by USA and its *amici* to salvage the presumption of antitrust injury from *per se* illegality is incorrect, as shown below.

A. The *Per Se* Illegality Of Vertical Maximum Price Fixing Neither Establishes That A Competitor's Losses Reflect Anticompetitive Effects Nor Precludes The Court From Recognizing That Such Losses Reflect Procompetitive Effects

The States' Brief adopts the formalistic approach of the Ninth Circuit opinion. The States concede that a plaintiff whose injury "is traceable to a pro-competitive effect of defendant's violation" does not suffer antitrust injury. (States' Br. 10.) But, they assert that *per se* illegality "legally

foreclose[s] [ARCO] from postulating any pro-competitive effect flowing from" vertical maximum price fixing. (*Id.*)[4] The States ask the Court to put on blinders to the fact that the lower prices resulting from the imposition of dealer price ceilings are procompetitive except in limited circumstances where they are predatory. (*See* pp. 16-19 below.) Justice Harlan, dissenting in *Albrecht v. Herald Co.*, 390 U.S. 145, 159 (1968) ("*Albrecht*"), recognized that vertically imposed price ceilings "do not lessen horizontal competition" and in fact "drive prices toward the level that would be set by intense competition." While the *Albrecht* majority cited other, anticompetitive effects that in its view justified retaining the *per se* illegality of vertical maximum price fixing, it did not dispute Justice Harlan's observation that price ceilings can have procompetitive effects. The Court recently recognized that "cutting prices in order to increase business often is the very essence of competition." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1984) ("*Matsushita*").

More directly relevant here are the Court's repeated statements that vertical restraints imposed by a single manufacturer have the potential to "stimulate interbrand competition. . . ." *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 341-42

[4] USA ambiguously asserts that "[i]n per se cases such as this one, the harm to competition is presumed and need not be proven." (Resp. Br. 12.) USA is correct to the extent it states only that in a *per se* case there is a presumption of anticompetitive effects in the market sufficient to justify substantive illegality. However, USA is wrong to the extent it also purports to assert that any plaintiff injured in fact by a *per se* violation can presume antitrust injury. (*See* Pet. Br. 20-21.) USA's arguments, which it had not made when it relied upon the formalistic approach, that the *per se* rule actually is based upon anticompetitive effects felt by competitors (as discussed at pp. 8-13 below) suggest that it has abandoned that approach and therefore intends only the former meaning.

(1987); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51-52 (1977) ("*Sylvania*").[5] Certainly there can be no greater stimulation of interbrand competition than lower prices, which put competitors to the choice either of reducing their prices or losing business. USA and its *amicus*, the Society of Independent Gasoline Marketers ("SIGMA"), complain of just such a stimulation of interbrand competition by the vertical restraints assumed here. They complain that ARCO unlawfully coerced its dealers to pass along wholesale price reductions, which they pejoratively describe as "subsidies." (Resp. Br. 6; SIGMA Brief *Amicus Curiae* ("SIGMA Br.") 3.) Assuming, as we must for present purposes, that ARCO used illegal coercion to prevent the dealers from pocketing these "subsidies," the ARCO dealers under existing law can recover the difference between the lower prices they actually charged and the higher prices they would have charged had they continued to allow the "independents" the price "advantage" claimed by USA and SIGMA to exist prior to 1982.[6] However, the issue whether USA and the dealers' other competitors also can recover the losses they suffered as a result of this increased price competition is a different matter. The effect as to those competitors was procompetitive. As demonstrated at pp. 7-8 below, competitors do not have a right under the antitrust laws to maintain a competitive advantage.

The *per se* rule does not require the Court to ignore the procompetitive effects of price ceilings. Thus, it does not signify that each and every effect of the unlawful conduct is anticompetitive. Rather, as the parties here agree, the rule simply presumes that as a general matter the anticompetitive effects so

[5] The Court limited its statement to nonprice vertical restrictions. 433 U.S. at 51 n.18. However, as discussed at pp. 11-12 below, the only price restraint the Court sought to exclude from the statement was vertical *minimum* price fixing.

[6] The Briefs of both USA and SIGMA reveal that their underlying complaint is that ARCO increased competition with retail prices reduced to levels the independents had thought were their exclusive domain. (*See* Resp. Br. 1 (major oil companies "have generally refrained from aggressive price competition"); SIGMA Br. 2 (independents previously underpriced ARCO dealers).)

outweigh the procompetitive effects that the conduct categorically can be presumed illegal. (Pet. Br. 18-19; Resp. Br. 11.) *See NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 104 n.26 (1984). Antitrust-injury analysis, which USA concedes "is substantially the same for per se and rule of reason offenses" (Resp. Br. 12), requires examination of the specific effects felt by the particular plaintiff. The plaintiff cannot rely on anticompetitive effects felt by others in the market (such as the coerced dealers). It can prove antitrust injury only by showing that *its* injury results from anticompetitive effects. Accordingly, the *per se* label cannot control the antitrust-injury analysis.[7]

B. The *Per Se* Illegality Of Vertical Maximum Price Fixing Is Not Based Upon Interference With A Competitor's "Right" To Compete In A Free Market

USA, conceding that the antitrust-injury requirement demands such a showing (Resp. Br. 12), strains to show that a competitor's lost profits are the type of injury that the *per se* rule against vertical maximum price fixing is intended to

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[7] The States also attempt to elevate labels over analysis by contending that USA's "lost sales and profits suffered as a competitor in the marketplace" are recoverable because such losses are a "classic form of injury under the antitrust laws." (States' Br. 11-12.) Antitrust injury does not depend upon the nature of the claimed injury in a vacuum, but rather upon the relationship between the injury and the reasons for substantive illegality. Accordingly, some lost sales and profits are antitrust injury and some are not, as is clear from *Brunswick* and *Cargill*, which denied recovery for just such losses.

In the context of vertical maximum price fixing, a coerced dealer's lost profits are antitrust injury, but the lost profits of a competitor of the coerced dealer are not. (*See* Pet. Br. 27-32.) The Brief *Amicus Curiae* of the Service Station Dealers of America mistakenly assumes that ARCO contends (and that the District Court found) that a dealer deprived by vertical maximum price fixing of "the right to control [his] retail price" does not suffer antitrust injury. (*Id.* at 1.) This issue simply is not presented here.

prevent. USA's argument is based upon the assertion that "[v]ertical maximum price-fixing interferes with a competitor's right to compete in a free market." (Resp. Br. 14.)

Neither of the opinions USA cites supports this assertion. Neither *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252 (2d Cir. 1989), nor *Volvo North America Corp. v. Men's International Professional Tennis Council*, 857 F.2d 55 (2d Cir. 1988), involved vertical maximum price fixing. The *Gold Fields* plaintiff was a target of an allegedly illegal horizontal acquisition. The *Volvo* plaintiff was a member of the horizontal conspiracy it was challenging. In the context of vertical maximum price fixing, the plaintiffs in those cases more closely resemble the coerced dealers, who concededly suffer antitrust injury, than the coerced dealers' competitors, like USA, who do not. In each case the antitrust violation directly deprived the plaintiff of "the power of independent decision-making as to price and output" (871 F.2d at 258), just as vertical price fixing " 'cripple[d] the freedom of [the coerced dealers] and thereby restrain[ed] their ability to sell in accordance with their own judgment' " in *Albrecht*, 390 U.S. at 152 and *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951) ("*Kiefer-Stewart*"). A competitor of the coerced dealer is not directly restrained by the unlawful conduct but retains the ability independently to determine the price it will charge in competition with the dealers who are directly restrained. Accordingly, USA's reliance on those opinions is misplaced.

More fundamentally, USA's asserted competitor's right to compete both does not exist and has not in fact provided a basis for imposing *per se* illegality on vertical maximum price fixing. The asserted right is inconsistent with the guiding principle that the antitrust laws "were enacted for 'the protection of *competition*, not *competitors*.' " *Brunswick*, 429 U.S. at 488. USA simply repeats the Ninth Circuit's error in improperly equating the interests of competitors and consumers. (Resp. Br. 14-15.) A competitor may not bring an antitrust claim any time it is injured by conduct that violates the antitrust laws. Rather, it may bring such a claim only where its injury coincides with injury to consumers. *A.A.*

Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1403-04 (7th Cir. 1989) ("courts should treat with great skepticism complaints by competitors who are injured by the low prices that customers adore, when the customers are content"). (*See also* authorities cited at Pet. Br. 35-42.) And, as discussed more fully below, the Court never has identified the loss of a competitor's right to compete as a reason for the *per se* illegality of vertical maximum price fixing.

C. The *Per Se* Illegality Of Vertical Maximum Price Fixing Is Not Based Upon Adverse Effects On An Interbrand Competitor

USA also argues that its losses as an interbrand competitor amount to antitrust injury because this Court, in making maximum vertical price fixing *per se* illegal, has focused on injuries to interbrand competition. (Resp. Br. 17-20.) USA, however, does not dispute ARCO's showing that neither of the two opinions in which the Court has held such conduct *per se* illegal cited competitors' injuries. (*See* Pet. Br. 27-32.) Instead, USA cites the Court's recent decision in *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 108 S. Ct. 1515 (1988) ("*Sharp*"). *Sharp* not only does not support USA's position, it conclusively refutes the position.

USA claims that *Sharp* explicitly recognized that " 'vertical price restraints reduce *inter*brand competition because they "facilitate cartelizing" ' " and that these adverse effects on interbrand competition "are precisely what warranted this Court's per se treatment of vertical price fixing." (Resp. Br. 17.) The very next sentence of the *Sharp* opinion belies USA's reliance on that language in a maximum price fixing case by clearly showing that the quoted language refers only to *minimum* price fixing:

> "The authorities cited by the Court [in *Sylvania*, 433 U.S. at 51 n.18] suggested how vertical price agreements might assist horizontal price fixing at the manufacturer level (by reducing the manufacturer's incentive to cheat on a cartel, since its retailers could not pass on lower prices to consumers) or might be used to organize cartels at the retailer level."

108 S. Ct. at 1520. Only in vertical *minimum* price fixing cases, in which floors are set on retail prices, can the retailers "not pass on lower prices to consumers." Vertical *maximum* price fixing sets price ceilings. Since retailers remain free to price below the ceilings, the manufacturers would retain the incentive to cheat on a cartel by lowering their prices and increasing their volumes. Therefore, the identified danger at the manufacturer level, which is the level to which USA's Brief points,[8] is expressly limited to minimum price fixing.

Moreover, the danger of cartelization at the retail level, to which *Sharp* also refers but to which USA's Brief does not even point, is similarly limited to vertical *minimum* price fixing. The concern to which the Court there referred is grounded in the theory that price fixing that appears vertical actually can be a horizontal cartel among retailers which they coerce or induce the manufacturer to administer and police. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 103 (1980). Retailers have the incentive to organize such a scheme only to keep their intrabrand competitors' prices at artificially high levels (*i.e.*, to use minimum price fixing to avoid being underpriced). Retailers have no interest in organizing a scheme to fix ceilings on their prices. Price ceilings emanate instead from the manufacturer, which wishes to prevent its retailers from pocketing price cuts that it wants passed along to consumers in order to increase its sales volume. *See Sharp*, 108 S. Ct. at 1520 ("in order to meet that interbrand competition, a manufacturer's dominant incentive is to lower resale prices"). For this reason, "unilateral maximum price pressure against retailers is not the equivalent of a horizontal combination, but rather of a series of vertical agreements for the manufacturer's benefit." *Quinn v. Mobil Oil Co.*, 375 F.2d 273, 277 (1st Cir.) (Coffin, J., concurring), *cert. dismissed*, 389 U.S. 801 (1967). Accordingly, vertical maximum price fixing presents

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[8] *See* Resp. Br. 18-19 & n.16 (positing the possibility of collusion between ARCO and other major oil companies).

none of the dangers of facilitating cartelization at the retailer level found in vertical minimum price fixing.

Sharp also refutes USA's argument that ARCO's vertical maximum price fixing, by eliminating USA from the market (which it in any event did not), can be presumed to facilitate horizontal collusion among the major oil companies and thereby enable supracompetitive pricing without single-firm market power. (Resp. Br. 18-20.) The Court in *Sharp* rejected the less farfetched contention that the termination (and hence actual elimination from the market) of a "price cutter" could be presumed illegal as a result of its facilitation of cartelization. The Court stated:

> "Any assistance to cartelizing that such an agreement might provide cannot be distinguished from the sort of minimal assistance that might be provided by vertical non price agreements . . . . Cartels are neither easy to form nor easy to maintain. Uncertainty over the terms of the cartel, particularly the prices to be charged in the future, obstructs both formation and adherence by making cheating easier. . . ."

108 S. Ct. at 1521. USA provides no basis to presume that the later price collusion between ARCO and the other major oil companies that it posits will be any less difficult to form and maintain. Rather, USA baldly asserts that ARCO can "stabilize retail margins in the concentrated market at higher levels" without explaining why the firms (both majors and nonmajors) with the remaining 83% of the market will not compete those prices down to competitive levels.[9] (*See* Resp. Br. 19.)

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[9] Indeed, Professor Sullivan (of counsel on USA's Brief) and Professor Fox (cited extensively by USA) agree on the extreme difficulty and low probability of forming and maintaining a manufacturer cartel,

(Continued on following page)

Finally, *Sharp* directly rebuts USA's contention, which is irrelevant in any event, that "a manufacturer's vertical conspiracy to eliminate intrabrand discounters is unlawful per se." (Resp. Br. 19-20.) The Court in *Sharp* explicitly held that such a vertical conspiracy is not *per se* illegal. 108 S. Ct. at 1525. And, in so holding, the Court specifically stated that neither of the opinions that USA cites for that proposition so hold. The Court described *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960), and *United States v. General Motors Corp.*, 384 U.S. 127 (1966), as involving "horizontal combinations" among competitors and not merely vertical conspiracies. 108 S. Ct. at 1525.

None of the other opinions cited by USA supports its contention that a single supplier's *intrabrand* vertical maximum price fixing can be presumed to facilitate *interbrand* cartelization, which in turn will lead to supracompetitive prices. (Resp. Br. 18-19.)

1. *Sylvania* certainly does not support that contention. Indeed, the Court there stated that intense interbrand competition, as the District Court found existed here, "provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product." 433 U.S. at 51 n.19. Moreover, USA's contention that footnote 18 of the *Sylvania* opinion did not distinguish between maximum and minimum price fixing is wrong. (Resp. Br. 18 n.13.) Footnote 18 referred to "resale price maintenance," which is minimum

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especially in a market which is not highly concentrated, such as the retail gasoline market. *See* Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 Cornell L. Rev. 1140, 1164-65 (1981) ("The domestic oil industry is not highly concentrated;" in absence of high concentration, cartels, if formed, have little chance of success because of likelihood of entry by outsiders and cheating by insiders); L. Sullivan, *Handbook of the Law of Antitrust*, 162-63 (1977) ("strong pressures against cartelization," even in concentrated industry; "strong temptation for individual participants to cheat," resulting in "tendency for the cartel to break down").

price fixing. The article by then-Professor Posner,[10] as well as the state fair-trade laws,[11] cited therein also related only to minimum price fixing. This is confirmed by the language quoted above from *Sharp*, 108 S. Ct. at 1520.

2. *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 342 (1987), involved and expressly referred to vertical price fixing that was both "industry wide" and minimum. Neither circumstance is presented here.

3. The Court in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 348 (1982), very carefully limited its discussion to horizontal price fixing, which was the conduct at issue there. The Court noted that "*Kiefer-Stewart* and *Albrecht* place *horizontal* agreements to fix maximum prices on the same legal – even if not economic – footing as agreements to fix minimum or uniform prices." (Emphasis added). It further noted that "*horizontal* restraints are generally less defensible than vertical restraints." 457 U.S. at 348 n.18 (emphasis added). The *Arizona* Court's comment, upon which USA relies, that a horizontal maximum price-fixing conspiracy "may be a masquerade for an agreement to fix uniform prices, or it may in the future take on that character," 457 U.S. at 348, has no application to vertical maximum price fixing involving a single interbrand competitor. *See* p. 9 above.

4. The concern expressed in *Albrecht*, 390 U.S. at 153, that vertical maximum price fixing can resemble minimum price fixing is not pertinent here for two reasons. First, USA does not contend that ARCO's price fixing inflated prices above competitive levels or otherwise effectively set price minimums. Second, to the extent that this were so, USA as a competitor of such masqueraded price minimums would be benefitted, not hurt, and therefore would not satisfy the

[10] *See* Posner, *Antitrust Policy and The Supreme Court: An Analysis Of The Restricted Distribution, Horizontal Merger And Potential Competition Decisions*, 75 Col. L. Rev. 282, 294 (1975) ("*industry-wide resale price maintenance might* facilitate cartelizing. . . .") (emphasis added).

[11] The Miller-Tydings Amendment to the Sherman Act expressly applied only to "minimum resale prices." 50 Stat. 693 (1937).

threshold requirement of antitrust injury. *Cf. Matsushita*, 475 U.S. at 596 n.20.

II. A COMPETITOR CANNOT ESTABLISH ANTITRUST INJURY FROM NONPREDATORY PRICES SET BY VERTICAL MAXIMUM PRICE FIXING

For the first time in this case, USA argues in its Brief that antitrust injury can be proved by demonstrating that ARCO's assumed vertical maximum price fixing violates section 1 not under the *per se* rule (for its anticompetitive effects on the coerced dealers) but under the rule of reason (for its anticompetitive effects on competitors of the coerced dealers). (Resp. Br. 20-23.) USA's argument fails under both of the standards for determining antitrust injury announced in *Brunswick*, 429 U.S. at 489.[12]

A. A Competitor's Losses From Nonpredatory Prices Cannot Reflect The Reasons Why Vertical Maximum Price Fixing Is Unlawful

USA's rule-of-reason approach cannot satisfy the *Brunswick* requirement that a plaintiff's loss be "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." 429 U.S. at 489. Vertical maximum price fixing – the only conduct at issue here – is unlawful as a result of the restraint it imposes on the dealer's independence to set prices in accordance with his own judgment. (*See* Pet. Br. 28-30.) No decisional law suggests that the illegality of this conduct under section 1 depends on the level at which the coerced dealer sets his prices or on the effects of those prices on others. Accordingly, the coerced dealer's loss of pricing freedom is the only type of loss that the law against vertical maximum price fixing was

[12] Moreover, USA's offer, made for the first time in this Court, comes far too late in these proceedings. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, ___ n.2, 108 S. Ct. 1931, 1936 n.2 (1988) (the Court's practice is to "decide the case as it was framed by the Court of Appeals").

intended to prevent and the only type of loss that flows from the reason for making such conduct unlawful.[13]

USA disputes neither the legal principle that coercion is the *sine qua non* of vertical maximum price fixing nor that its section 1 case depends upon proving that ARCO "secured dealer compliance through coercive tactics." (Resp. Br. 2.)[14] Nonetheless, it attempts to rewrite the basis of such liability by arguing that vertically imposed price ceilings can be illegal as a result of effects on competitors. (Resp. Br. 21-22.) None of the opinions USA cites, however, supports its position. In each of those cases the restraint directly controlled the pricing of an interbrand competitor which was brought into a horizontal conspiracy or unlawfully acquired. Illegality was based upon this direct restraint and not upon any effects flowing from the restraint felt by competitors of the parties to the unlawful conduct. *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), and *United States v. Container Corp. of America*, 393 U.S. 333 (1969), involved agreements to exchange price information among horizontal competitors. *Hospital Corp. of America v. FTC*, 807 F.2d 1381 (7th Cir. 1986), *cert. denied*,

[13] The SIGMA Brief asserts that the coercive loss of the dealer's pricing discretion satisfies only the section 1 requirement of concerted action, which it contends is not relevant to the antitrust-injury issue. (SIGMA Br. 13.) The Court's opinions in *Kiefer-Stewart* and *Albrecht*, as well as the Circuit Court opinions cited at Pet. Br. 29 n.16, clearly show that the dealer's loss of discretion to set prices to his retail customers also satisfies the section 1 requirement that there be an unreasonable restraint of trade. Indeed, none of those opinions cites any other restraint of trade making the concerted conduct unlawful.

[14] The States' Brief disputes both points. (States' Br. 13.) The States, however, cite no authority for their contention that vertical maximum price fixing can be found when "dealers willingly cooperate[]." That contention is rebutted by the authorities cited at Pet. Br. 27-30. If the States' position were correct, manufacturers could not suggest prices, and certainly could not seek lower dealer prices through " 'exposition, persuasion and argument.' " *Gray v. Shell Oil Co.*, 469 F. 2d 742, 748 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973).

481 U.S. 1038 (1987), similarly involved the elimination of significant interbrand competition directly through unlawful conduct – the acquisition of horizontal competitors. The loss of the pricing independence of an interbrand competitor through an unlawful restraint imposed directly on that competitor, which was the basis for imposing illegality in these three opinions (and the other opinions cited by USA and discussed at p. 7 above), is not even analogous to the loss suffered by a competitor as a result of having to compete against low prices that are enabled by a vertical restraint. Therefore, none of these opinions provides any support for USA's argument that it can establish that ARCO's vertical imposition of price ceilings is illegal by introducing evidence to support its allegations concerning effects in the interbrand market. (See Resp. Br. 22-23.)[15]

USA could establish that the low ARCO prices themselves (as opposed to the vertical coercion that brought them about) were illegal only by showing that they were predatory

[15] USA did not attempt on this motion to prove any of these allegations or even to contend that such allegations raised a genuine issue of material fact. (*See* p. 2 n.2 above.) The only authorities cited in any opposing Brief do not require that this Court accept such allegations as true. *Bishop v. Wood*, 426 U.S. 341, 347 (1976), and *Baker v. Department of Navy*, 814 F.2d 1381, 1382 (9th Cir.), *cert. denied*, 484 U.S. 963 (1987) (cited at States' Br. 6), only require that "all genuine disputes as to material facts" be resolved, and that all *evidence* be viewed, favorably to USA. Moreover, the allegations cited at Resp. Br. 22-23 are inherently incredible. For example, USA contends that ARCO "successfully eliminated [the independent] segment of the industry, leaving the other major integrated oil companies untouched." The independents obviously have not been eliminated. It is clear from Respondent's Brief that USA has not been eliminated as a competitor. (Resp. Br. 1.) SIGMA's Brief states that SIGMA is composed of 315 independent marketers selling refined petroleum products in all 50 states, owning and operating over 11,000 retail stations and supplying an additional 13,700 retail outlets, and having a market share of nearly 17%. (SIGMA Br. 1.)

in violation of section 2.[16] USA then would establish antitrust injury, because its loss as a competitor would reflect the reason for imposing illegality. USA's Amended Complaint alleged that the prices were predatory. (JA 18.) However, when put to the burden of producing evidence to support its allegations, USA conceded that it could not prove predatory pricing (*see* Pet. Br. 6 n.5) and dismissed its section 2 claim. (JA 76-77.)

B. It Would Be Inimical To The Purposes Of The Antitrust Laws To Allow Recovery For A Competitor's Losses From Nonpredatory Prices Set By Vertical Maximum Price Fixing

USA's attempt to prove antitrust injury by substituting a rule-of-reason approach for predatory pricing also runs afoul of the other rationale articulated in *Brunswick* for not allowing recovery for all injuries caused in fact by an antitrust violation. The Court held that "[i]t is inimical to the purposes of [the antitrust] laws to award damages for" injuries resulting from competition. *Brunswick*, 429 U.S. at 488; *Cargill*, 479 U.S. at 109-10. Significantly, USA is a member of the very same class of plaintiffs – competitors – whose claims the Court rejected in *Brunswick*, *Cargill* and *Matsushita*. In each of those cases, the Court rejected the competitor plaintiff's claim after carefully analyzing whether the claim coincided or conflicted with the consumer interests that are the primary concern of antitrust law. (*See* Pet. Br. 35-37.) In so doing, the Court articulated a policy against allowing recovery for losses from a competitor's low prices that present no real prospect of ultimately injuring the interests of consumers.[17]

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[16] While contracts, combinations and conspiracies can be illegal under section 1, prices can be illegal only as a means of acquiring or maintaining monopoly power in violation of section 2.

[17] The States' Brief asserts that "[t]he impact of an antitrust defendant's conduct upon consumers is irrelevant as to whether a plaintiff

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USA argues that *Matsushita* and *Cargill* do not require that a competitor plaintiff in such a case show a market structure that would permit future monopoly pricing. (Resp. Br. 25-30 & nn.22, 27.) USA relies on footnote 8 in *Matsushita*, 475 U.S. at 584-85 (and its citation in footnote 12 in *Cargill*, 479 U.S. at 117-18) to argue that such a plaintiff can satisfy *Brunswick* by showing that its competitors' prices are below either the level necessary to sell their products or some measure of cost. However, both footnote 8 and the rest of the *Matsushita* opinion make clear that the Court did not intend footnote 8 to address the *Brunswick* antitrust-injury issue presented here. On its face, footnote 8 is limited to the minimum requirement, which is *necessary* but *not sufficient* for antitrust injury, that a plaintiff's losses be caused in fact by the defendant's violation.[18] Thus, the pertinent sentence of footnote 8 begins with the phrase "[f]or purposes of this case, it is enough to note" and is followed with a sentence that states "[r]espondents therefore may not complain of conspiracies that, for example, set maximum prices above market levels, or that set minimum prices at *any* level."

Footnote 8 does not even cite *Brunswick*. Rather, the Court addresses *Brunswick* in the text and in footnote 7, where it describes the plaintiffs' claim as one for conspiratorial "monopolization of the American market through predatory pricing" and states that *Brunswick* requires the plaintiffs to prove "that petitioners conspired to price predatorily in the American market, since the other conduct involved in the alleged conspiracy cannot have caused such an injury [*i.e.*, *Brunswick* antitrust injury]." 475 U.S. at 584

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competitor suffered antitrust injury." (States' Br. 4; *see also* 8, 15-16.) This assertion, upon which much of the States' Brief is based, is incorrect, as demonstrated by the authorities cited at Pet. Br. 35-37 & n.19. It is incredible that the Attorneys General of eleven states would so denigrate the importance to antitrust law of the interests of consumers.

[18] It was necessary for the Court in *Matsushita* to address the cause-in-fact requirement because the plaintiffs were seeking to challenge

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n.7; *see also* 586 (only "the alleged conspiracy to monopolize the American market through predatory pricing" could inflict *Brunswick* antitrust injury).[19] Moreover, the *Matsushita* opinion as a whole, and particularly Part IV.A. thereof, confirms the need in a predatory pricing case for a market structure that will permit the conspirators to earn the future monopoly profits necessary to recoup their losses during the period of predation. *See* 475 U.S. at 588-93.[20]

Cargill is to the same effect. Contrary to USA's arguments, *Cargill* defined predatory pricing in terms of a market structure that would permit recoupment of the losses sustained during the period of predatory pricing. *See* 479 U.S. at 117, 119 n.15, 121 n.17.[21] In a recent opinion, Judge Easterbrook recognized that both *Cargill* and *Matsushita* had

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conduct by competing Japanese manufacturers that would have *raised*, not *lowered*, the prices they charged in the United States. 475 U.S. at 578, 583.

[19] USA ignores this language, and contends disingenuously that the Court described the conspiracy alleged in *Matsushita* only as "one 'to charge below market prices.' " (Resp. Br. 26 n.22.)

[20] The Court specifically rejected as a basis for imposing liability based upon the challenged low prices the theory that a defendant without monopoly power could later charge supracompetitive prices through collusion, as posited by USA here. The Court stated:

> "The alleged predatory scheme makes sense only if petitioners can recoup their losses. In light of the large number of firms involved here, petitioners can achieve this only by engaging in some form of price fixing *after* they have succeeded in driving competitors from the market. Such price fixing would, of course, be an independent violation of § 1 of the Sherman Act."

475 U.S. at 592 n.16. And, the Court did not even discuss, and thereby impliedly rejected, the possibility of future supracompetitive pricing under an oligopoly theory, which is the other theory posited here by USA. (*See* Resp. Br. 29 & n.26.)

[21] USA's assertion that the Court in *Cargill* did not address oligopoly pricing certainly does not support USA's reliance on an oligopoly

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employed the "recoupment" theory to determine whether competitors' losses from low prices amounted to antitrust injury. *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401 (7th Cir. 1989). That opinion sets forth a compelling case for the Court's continuing use of this standard to determine antitrust injury:

> "Predatory prices are an investment in a future monopoly, a sacrifice of today's profits for tomorrow's. The investment must be recouped. If a monopoly price later is impossible, then the sequence is unprofitable and we may infer that the low price now is not predatory. More importantly, if there can be no 'later' in which recoupment could occur, then the consumer is an unambiguous beneficiary even if the current price is less than the cost of production. Price less than cost today, followed by the competitive price tomorrow, bestows a gift on consumers. Because antitrust laws are designed for the benefit of consumers, not competitors . . . a gift of this kind is not actionable."

Id. (citations omitted).[22] ARCO respectfully requests that the

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theory. (*See* Resp. Br. 30 n.27.) The Court refused to address the issue in *Cargill* because it had not been raised in the lower courts, which also is the case here. 479 U.S. at 114 n.9. And, USA's assertion that "even a single firm with a low market share might nevertheless find a predatory pricing strategy feasible" is inconsistent with the thrust of the very footnote it cites:

> "With only a 28.4% share of market capacity and lacking a plan to collude, Excel would harm only itself by embarking on a sustained campaign of predatory pricing. Courts should not find allegations of predatory pricing credible when the alleged predator is incapable of successfully pursuing a predatory scheme."

479 U.S. at 119-20 n.15.

[22] *Neumann v. Reinforced Earth Co.*, 786 F.2d 424, 427 (D.C. Cir.), *cert. denied*, 479 U.S. 851 (1986), cited at Resp. Br. 29, similarly defines predation as "the deliberate seeking of monopoly power. . . ." (*See* Pet. Br. 41-42 & nn.23-25.)

Court reaffirm this standard and reinstate the District Court's summary judgment based thereon.[23]

CONCLUSION

The judgment of the Ninth Circuit should be reversed and the summary judgment of the District Court reinstated.

October 20, 1989.

Respectfully submitted,

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[23] The *Amicus Brief* for the United States and the FTC suggests a remand to the Ninth Circuit to determine whether USA preserved its right to challenge the District Court's conclusion that USA could not prove predatory pricing and, if so, whether that conclusion is correct. (USA/FTC Br. 22-23 n.16.) Such remand is unnecessary for a number of reasons: (1) USA no longer asserts that it can prove predatory pricing. (2) USA did not preserve its right so to contend, both by not raising the issue on appeal and by not identifying predatory pricing as a genuine issue on ARCO's motion in the District Court. (*See* Pet. Br. 43-44 & n.28.) (3) The District Court correctly applied the "recoupment" standard to determine the issue, as this Court can decide without addressing the appropriate measure of cost to use in a predatory pricing case where the market structure makes recoupment possible.